SUPREME COURT, U. S.

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in the Supreme Court of the United States

October Term, 1970

No. 382

UNITED STATES OF AMERICA, for the use and benefit of T/N PLUMBING & HEATING CO.,

Petitioner,

vs.

AMERICAN FIRE AND CASUALTY COMPANY and UNITED STATES OF AMERICA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENT, AMERICAN FIRE AND CASUALTY COMPANY, IN OPPOSITION

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PRELIMINARY STATEMENT

Petitioner, UNITED STATES OF AMERICA, for the use and benefit of T/N PLUMBING & HEATING CO., seeks review of a decision of the United States Court of Appeals, Fifth Circuit, insofar as the same affirms two separate summary judgments entered by the United States District Court in and for the Southern District of Florida, Miami Division.

JURISDICTION

Although Petitioner seeks review by Writ of Certiorari under 28 U.S.C. § 1254 (1), the Petition for Writ of Certiorari does not present any special and important reason as anticipated by Rule 19, Supreme Court Rules, to warrant review on Writ of Certiorari.

The decision of the Court of Appeals, which affirmed the Summary Judgment entered in favor of AMERICAN FIRE AND CASUALTY COMPANY, did not render a decision in conflict with the decision of another court of appeals, nor did it decide a federal question or an important state question in conflict with the state law. Finally, the Court of Appeals did not depart from the accepted and usual course of judicial proceedings, nor did it sanction such a departure by the District Court. The decision of the Court of Appeals merely affirmed the District Court's finding that "there is no genuine issue as to any material fact, and that AMERICAN is entitled to the judgment hereinafter entered in its favor as a matter of law".

QUESTION PRESENTED

This portion of the Petition, as well as the entire Petition itself, is directed primarily toward the Respondent, UNITED STATES OF AMERICA; however, Petitioner does assert:

> "The depositions and pleadings assert the existence of a genuine issue of material fact . . . as to whether or not American Fire and Casualty Company had wrongfully taken over Petitioner's subcontract."

The Petitioner further states that the question presented as to Respondent, AMERICAN FIRE AND CASUALTY COMPANY, is:

> "Whether contraverted allegations involving . . . American Fire and Casualty Company were properly resolved by summary judgment."

Respondent, AMERICAN FIRE AND CASUALTY COMPANY, respectfully urges that the question concerning the existence or non-existence of a genuine issue of material fact was briefed and argued in the Court of Appeals, which Court concluded, as had the District Court, that there existed no genuine issue as to any material fact, and is not a question requiring the exercise of this Court's power of supervision. The Respondent, AMERICAN FIRE AND CASUALTY COMPANY, respectfully urges that there exists no basis for a review on Writ of Certiorari.

STATEMENT OF THE CASE

The Respondent, AMERICAN FIRE AND CASUALTY COMPANY, does not agree that the statement of the case as presented by the Petition for Writ of Certiorari is an accurate and complete presentation of the case; however, for the purpose of the Court's consideration, at this time, the only specific objection that Respondent makes concerns the representation that affidavits in opposition to the motions for summary judgment (R. 294-312; 994-1013) create a genuine issue of material fact. This suggestion is totally unsupported by the record.

ARGUMENT

Petitioner has subdivided his argument into three numbered parts. The first, suggesting that the Court of Appeals has decided an important question of federal law, is not directed to the Respondent, AMERICAN FIRE AND CASUALTY COMPANY, and the second part, suggesting a conflict among circuits, is also limited in its argument to the Respondent, UNITED STATES OF AMERICA.

The third and remaining point suggests that the "court below has so far sanctioned a departure from the accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision". This suggestion, and the argument contained thereunder, is without merit. The decision of the Court of Appeals that the entry of summary judgment in favor of the Respondent, AMERICAN FIRE AND CASUALTY COMPANY, was proper, is eminently correct and presents no issue warranting plenary consideration by this Honorable Court.

Certainly, this Court is not constituted to grant certiorari and thereby undertake to review a record to determine whether the Court of Appeals and District Court correctly concluded that there is no genuine issue as to any material fact".

Certiorari should not be granted "for the mere purpose of re-examining the correctness of the result", *Deputy* vs. *DuPont*, 308 U.S. 488, 60 S.Ct. 363, 84 L.Ed. 416, nor is review by certiorari intended for the benefit of particular litigants, except in cases involving principles, the settlement of which is important to the public. *Layne & Bowler Corp.* vs. *Western-Well Works, Inc.*, 216 U.S. 387, 43 S.Ct. 422, 67 L.Ed. 712; *Magnum Import Co.* vs. *Coty*, 262 U.S. 159, 43 S.Ct. 531, 67 L.Ed. 922.

CONCLUSION

For the reasons stated, the Respondent, AMERICAN FIRE AND CASUALTY COMPANY, respectfully urges that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief of Respondent was mailed this 7 day of August, 1970 to:

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